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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re H.V., a Person Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY/CHILDREN & FAMILY SERVICES, Plaintiff and Respondent, v. H.V., Sr., Defendant and Appellant.	A123521 (Alameda County Super. Ct. No. OJ07006015)

This is an appeal from a juvenile court order terminating the parental rights of appellant H.V., Sr., pursuant to Welfare and Institutions Code section 366.26.[1] Appellant challenges this order on the ground that the juvenile court erred in finding that his son, H.V., was adoptable. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

H.V. (minor) was born in May 2006 to appellant (father) and D.W. (mother) (collectively, parents). The minor was made a dependent of the juvenile court and placed in out-of-home care on March 15, 2007, based on a petition filed by respondent Alameda County Social Services Agency/Children & Family Services (the agency) under section

[1] Unless otherwise stated, all statutory citations herein are to the Welfare and Institutions Code.

300, subdivision (b), indicating that the parents were unable to meet the minor's special medical needs. Further, the minor's mother had a severe history of alcohol abuse, and appellant had done a poor job of compensating for her inability to adequately care for the minor.[2]

According to the petition, the minor suffers from a metabolic disorder known as phenylketonuris (PKU), which requires a strict, specialized diet.[3] Failure to adhere to this special diet, particularly during the first years of life, could result in the minor's abnormal growth and development and possible mental retardation. However, with strict adherence to the special diet, the minor could achieve normal growth and development. The minor thus requires strict medical and nutritional monitoring, in addition to regular pediatric treatment, to ensure his metabolic levels remain stabilized. However, according to the agency's social worker, the parents were not adhering to the minor's strict diet, were not consistently monitoring his nutritional intake, and had missed several of his blood tests. As a result, the minor's levels of the essential enzyme, phenylalanine hydroxylase (PHE), were unstable, putting his health and well-being at risk.

On June 1, 2007, the minor was placed in the home of a relative caregiver, paternal aunt Helena, who lived in Stockton. Helena had previously been interested in adopting the minor's older sister, A.V., born in May 2003, after the parents had failed to reunify with her in 2004, but Helena's home at that time had not been approved by the agency. Thereafter, the paternal grandmother, who also lived with Helena and her family, became the legal guardian of A.V.[4]

According to the agency's August 28, 2007, status review report, Helena loved the minor and was committed to caring for him long term. The minor's PHE levels had stabilized and he had not missed a blood test or other medical appointment since being

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[2] The parents had been married, but were later separated and then divorced.

[3] This strict diet restricts the minor's consumption of high protein foods, and requires instead consumption of medical formulas, low protein grains, vegetables, fruits, fats and simple sugars.

[4] The minor had three other older siblings who lived with his mother.

placed in Helena's care. The minor was developmentally delayed and attended a special school, but was a happy child who smiled a lot, ate and slept well, and enjoyed playing blocks and music. In addition, under Helena's care, the minor had made developmental improvements.

The juvenile court initially ordered reunification services for both parents, contrary to the agency's recommendation, but then terminated those services for mother on May 15, 2008, and for father on October 16, 2007, after finding that parents had been unwilling to fully comply with the court-ordered family reunification plan. In particular, with respect to appellant, the juvenile court found that he had failed to participate regularly or make substantial progress in court-ordered treatment plans, including a substance abuse treatment plan that was ordered after appellant appeared intoxicated during a visit with the minor. In addition, appellant had not been visiting the minor regularly or staying in contact with the agency, and had reportedly been arrested for unknown reasons.

On May 15, 2008, the juvenile court set the matter for a permanency planning hearing pursuant to section 366.26. On September 2, 2008, in anticipation of the section 366.26 hearing, the agency submitted a report recommending that the juvenile court terminate parental rights and order a permanent plan of adoption for the minor. On May 20, 2008, Child Welfare Supervisor Blythe had performed a permanency planning assessment of the minor and had determined he was adoptable. While the minor has a serious medical condition, it is controllable with appropriate nutritional and medical care and, thus, is no barrier to his adoption. Further, the agency "regularly places children with conditions requiring lifelong management in families willing and able to adopt them." In this case, Helena, the relative caregiver with whom the minor had been placed since June 2007, was interested in adopting him, making it "very likely" he would be adopted.

This report further noted that the home of the relative caregiver (presumably Helena) had been "re-approved" for the minor's placement on May 21, 2008. The minor was doing well in this placement, and was in good general health and attending a special

school for developmentally delayed children. The report described the proposed adoptive family as two relative caretakers, ages 35 and 36 (Helena and her husband), who lived with their three children, ages 12, 14, and 15, as well as the minor's 5 year-old sister and grandmother. Helena stayed home to care for the children, while her husband worked as a security guard. The family had cared for the minor for the past year, during which time they had been diligent in providing him the proper diet and medical care for his PKU metabolic disorder. Social worker Omari noted that Helena had "consistently demonstrated her ability to manage [the minor's] unique special needs," and that the entire family had become "quite attached" to him. Further, the minor was relating to the proposed adoptive mother as a "mother figure, seeking her reassurance and guidance."

Regarding the proposed adoptive family's social history, the report stated that "Nothing was discovered during the relative (NREFM) home assessment that indicates that any member of this household has a criminal record that would preclude their caring for the children. The adoption home study process includes a more detailed criminal record background check than the relative (NREFM) home assessment. Until the finger printing process for the adoptive home study is completed the [agency] may not have a full criminal history of the adults residing in the home."

Finally, the report concluded that the minor's parents and siblings (with the exception of his sister, A.V., with whom he lived) had not spent enough time with him to develop or maintain significant parent-child or sibling relationships. Further, minor was adoptable and placed with relatives who love him, provide for his special needs, and wish to adopt him. "Even if this relative family were not available there is no aspect to [the minor's] situation that would prevent the [agency] from locating an appropriate family for him."[5]

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[5] In August of 2008, the agency was informed for the first time that the minor may have Native American ancestry. On September 29, 2008, the agency filed an addendum report advising the juvenile court that it had received responses to notices mailed on August 14, 2008, and September 10, 2008, pursuant to the Indian Child Welfare Act that indicated the minor was not an Indian child.

On September 29 and October 30, 2008, a contested hearing was held pursuant to section 366.26 to determine whether the minor would benefit from a continuing relationship with the parents. Appellant's attorney made an offer of proof that appellant had maintained a steady parenting relationship with his son. Further, the attorney advised that appellant now had his own home and had finished parenting classes in September of 2007, but the court nonetheless improperly terminated his services while he was incarcerated and without notice of the hearing.

Appellant then testified that, while he did not visit the minor when he was incarcerated from October 2007 through April 2008, he had visited the minor over twenty to thirty times since his release from jail, including times when the minor had stayed overnight at his home in Berkeley. During these visits, appellant adhered to the minor's special diet, changed his diapers, bathed and fed him, and played games with him.

When the hearing continued on October 30, 2008, Helena testified that, contrary to appellant's testimony, appellant had visited the minor in the Oakland/Berkeley area only about six times from April 2008 to October 2008 (three times with Helena and three times with the grandmother). Helena further testified that the minor had never stayed overnight with appellant nor visited appellant's home during this time period.[6]

Following the contested hearing, the juvenile court found clear and convincing evidence that the minor was likely to be adopted, and that there was no parental relationship as to either parent that would benefit the minor. In making these findings, the juvenile court noted that it was accepting the testimony of Helena as true and correct to the extent it was inconsistent with that of appellant. Accordingly, the juvenile court adopted the agency's recommendation to terminate parental rights as to both parents.

This timely appeal followed.

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[6] On October 23, 2008, before the hearing was continued, the agency filed a status review report noting that adoption continued to be appropriate for the minor, and that FamiliesFirst Inc. was conducting an adoption home study of the proposed adoptive family. "The Agency will refer the case to the Finalization Team upon receipt of the approved home study from the contractual agency."

DISCUSSION

On appeal, appellant contends the juvenile court's finding that the minor was adoptable was not supported by substantial evidence. In particular, appellant contends the only evidence of the minor's adoptability was his paternal aunt Helena's desire to adopt him, which was insufficient as a matter of law to support the trial court's finding given the minor's special medical needs and the lack of approval of Helena's home. The relevant law is as follows.

"At a section 366.26 hearing, the court may (1) terminate parental rights and free the child for adoption, (2) identify adoption as the permanency plan goal and continue the hearing for no more than 180 days to locate an appropriate adoptive home for the child, (3) appoint a legal guardian, or (4) order the child's placement in long-term foster care. (§ 366.26, subd. (b).) At all proceedings under section 366.26, the court must consider the wishes of the child and act in the best interests of the child. (§ 366.26, subd. (h)(1).)" (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1231.) Further, before selecting a permanent plan of adoption, the court must find clear and convincing evidence that the child is likely to be adopted within a reasonable time. (§ 366.26, subd. (c)(1).) If the juvenile court finds such evidence, it then must terminate parental rights unless termination of parental rights would cause serious detriment to a child under one or more specific statutory exceptions. (§ 366.26, subds. (b)(1), (c)(1).)[7]

"Although a finding of adoptability must be supported by clear and convincing evidence, it is nevertheless a low threshold: The court must merely determine that it is 'likely' that the child will be adopted within a reasonable time. (§ 366.26, subd. (c)(1); [citation.].) We review that finding only to determine whether there is evidence, contested or uncontested, from which a reasonable court could reach that conclusion. It is irrelevant that there may be evidence which would support a contrary conclusion. (*In re*

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[7] Although not relevant to this appeal, we note that appellant argued below that the "beneficial parental relationship" exception should apply to preclude termination of his parental rights. (§ 366.26, subd. (c)(1)(A); see also *In re Amber M.* (2002) 103 Cal.App.4th 681, 690.)

Casey D. (1999) 70 Cal.App.4th 38, 53 [82 Cal.Rptr.2d 426].)"[8] (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292. See also *In re Asia L.* (2003) 107 Cal.App.4th 498, 509-510 [a finding of adoptability is reviewed for substantial evidence].)

Here, appellant argues the minor was not adoptable as a general matter because he has a metabolic disorder requiring special nutritional and medical attention. Further, appellant argues the minor was not specifically adoptable because the home of the prospective adoptive family, his paternal aunt Helena's family, had not yet been approved for adoption by the agency.

" 'The issue of adoptability . . . focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.]' [Citation.]" (*In re Zeth S*. (2003) 31 Cal.4th 396, 406.) " ' "Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family.*" ' [Citation.]" (*In re Asia L.*, *supra*, 107 Cal.App.4th at p. 510.) Thus, if "the child is considered generally adoptable, we do not examine the suitability of the prospective adoptive home." (*In re B.D.*, *supra*, 159 Cal.App.4th at pp. 1231-1232.)

Relevant to our inquiry, Child Welfare Supervisor Blythe assessed the minor on May 20, 2008, and found him highly adoptable. While Blythe acknowledged that the minor suffers from a serious medical condition (PKU), she concluded his condition was

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[8] The agency asks that we apply the abuse of discretion standard in reviewing the juvenile court's adoptability finding. However, the agency's own authority, *In re J.I.* (2003) 108 Cal.App.4th 903, requires otherwise: " ' 'The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." [Citations.]' " (*Id.* at p. 911.)

no barrier to his adoption because it is controllable with appropriate nutrition and medical care. In reaching this conclusion, Blythe noted that the agency "regularly places children with conditions requiring lifelong management in families willing and able to adopt them." Moreover, Helena, the relative caregiver with whom the minor had been placed since June 1, 2007, was very interested in adopting him and had demonstrated the ability to adhere to his special needs.

Blythe's opinion was supported by other evidence in the record. For example, the agency's status review report that was submitted to the juvenile court in September of 2008 noted that the minor was doing quite well under Helena's care. The minor's PHE levels had stabilized with strict adherence to a special diet, and his blood tests and nutritional consultations had thus been reduced to once monthly rather than biweekly. The report further noted that, as long as the minor continues to adhere to this strict diet and medical monitoring, his condition will not prevent him from achieving normal growth and development. Indeed, while the minor was attending a special preschool for developmentally delayed children, he was "making improvements" in several developmental areas and was slowly reaching his developmental milestones. In addition, the minor was in general good health, had no mental health problems, enjoyed playing and listening to music, and was described as a "happy baby who smiles easily."

Given this substantial evidence of the minor's young age, his general physical, emotional and mental well-being while adhering to a special diet, and his improving developmental skills, the juvenile court was entitled to find him likely to be adopted by either Helena's family or some other acceptable family. (See *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1651 [affirming the juvenile court's finding that the children were generally adoptable based upon substantial evidence of "the minors' young ages and their good physical and emotional health, progress in therapy, intellectual and academic growth, and ability to develop interpersonal relationships"]. Cf. *In re Asia L.*, *supra*, 107 Cal.App.4th at p. 510 [reversing the juvenile court's finding that the children were generally adoptable for lack of substantial evidence where the children had severe emotional and psychological problems, including hyperactivity and lack of self control,

which required constant supervision].) While the minor's special medical needs could be evidence supportive of a contrary finding, they provide no basis for reversing the juvenile court's finding in this case. (*In re K.B., supra,* 173 Cal.App.4th at p. 1292; *In re Asia L., supra,* 107 Cal.App.4th at pp. 509-510.)

Moreover, in light of this conclusion, we need not address appellant's remaining arguments regarding whether Helena's family is suitable and legally able to adopt the minor. As appellant points out, " '[w]here the social worker opines that the minor is likely to be adopted based solely on the existence of a prospective adoptive parent who is willing to adopt the minor, an inquiry may be made into whether there is any legal impediment to adoption by that parent [citations]. In such cases, the existence of one of these legal impediments to adoption is relevant because the legal impediment would preclude the very basis upon which the social worker formed the opinion that the minor is likely to be adopted. [Citation.]' (*In re Sarah M.* [(1994)] 22 Cal.App.4th [1642,] 1650.)" (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1408-1409.) However, as we just explained, this is not such a case. Here, the social worker, Blythe, opined that the minor would likely be adopted based on the treatable nature of his medical condition, the likelihood that, if properly treated, he would achieve normal growth and development, and his otherwise young age, good health and pleasant disposition. Accordingly, regardless of whether there are legal impediments to the minor's adoption by Helena, or whether Helena is otherwise unsuitable to serve as his adoptive mother, the juvenile court's adoptability finding must stand.[9] (See *In re Sarah M., supra,* 22 Cal.App.4th at p. 1651.)

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[9] We merely note that, in nearly all cases, a prospective adoptive family's suitability is irrelevant to the issue of whether a child is likely to be adopted: "General suitability to adopt is a subjective matter which does not constitute a legal impediment to adoption. If inquiry into the suitability of prospective adoptive parents were permitted in section 366.26 hearings, we envision that many hearings would degenerate into subjective attacks on all prospective adoptive families in efforts to avoid termination of parental rights. Such a result is not envisioned by the statutory scheme." (*In re Sarah M., supra,* 22 Cal.App.4th at p. 1650. Cf. *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061-1062 [considering the suitability of a prospective adoptive family where the child was

DISPOSITION

The juvenile court's order terminating appellant's parental rights is affirmed.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Siggins, J.

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specifically adoptable, but not generally adoptable, given that the child had disabilities requiring intensive, total care for life].)